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No. 82-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et al.,

Petitioners,

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS

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STATEMENT

Nowhere in their Brief for Respondents do respondents directly address the questions presented to this Court in this proceeding. Respondents instead list six arguments which have no relevance here. Overall, respondents also attempt to minimize the importance of petitioners' constitutional claims on the merits.

In this Reply Brief for Petitioners, we initially reply seriatim to the six arguments raised by respondents. Thereafter, we correct respondents' distortions of the merits proceeding in this case by reiterating the crucial role that petitioners' constitutional claims played throughout this litigation on the merits in preventing the total denial of education services to petitioner Tommy Smith. Because petitioners, within this constitutional context, ultimately prevailed primarily as a result of certified state law

questions decided by the Rhode Island Supreme Court, we also explain that this Court's recent decision in Pennhurst State School & Hospital v. Halderman, 104 S.Ct. 900 (1984) ("Pennhurst II"), has no applicability here since this case on the merits never involved either a pendent state claim or a federal court order requiring compliance by state officials with state law.

ARGUMENT

I. The Specific Arguments Raised in the Brief for Respondents Are Entirely Without Merit

The six arguments raised in the Brief for Respondents warrant no more than a cursory reply.

1. Petitioners have not claimed here that the Education for All Handicapped Children Act [the "EAHCA"] is a "law" enforceable through 42 U.S.C. § 1983. See Brief for Petitioners at 55-56 & n.23.

Petitioners accordingly have not "conceded" that the EAHCA is not enforceable through § 1983. Brief for Respondents at 3. Instead, this simply is an issue not presented to this Court. Cert. Pet. at 13-14 n.3, 19 n.6.

2. Petitioners' constitutional claims on the merits were hardly "moot, hypothetical [or] unreal." See Brief for Respondents at 7. Quite to the contrary, petitioners' due process claim afforded them temporary and preliminary injunctive relief not only against the local school committee defendants, J.A. 27-29, 30-31, 32-48, but against respondents as well, J.A. 127-28. Additionally, the strength and viability of petitioners' equal protection claim was demonstrated by the district court's uncontested and unappealed finding that the claim was substantial, A. 42-43, and is further apparent from this Court's equal protection decisions and from the many lower court cases in which

such a claim has prevailed as a matter of law, see Brief for Petitioners at 41-42 n.18.

3. For the reasons just stated, see also infra at 9-11, there is no question that petitioners' constitutional claims were in fact substantial.

4. Contrary to respondents' next assertion, the Commissioner of Education (respondent Pontarelli) enjoyed no immunity on the merits proceeding in this case for actions which respondents allege were taken in a quasi-judicial capacity. See Brief for Respondents at 13-14. As the district court correctly ruled in denying respondents' motion to dismiss the merits on this ground, J.A. 179-81, judicial immunity immunizes judicial actors from damages but not from declaratory or injunctive relief such as was sought in this lawsuit, and, in any event, respondent Pontarelli and his predecessor in office were sued here in their enforcement

capacities in which they may be properly held liable, see Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). Additionally, since the district court's ruling on the merits of this issue was affirmed by the First Circuit on respondents' appeal, J.A. 6,[1] and since respondents never sought further review of this issue, it is not now open to review under the doctrines of res judicata, law of the case, and finality of judgments. This issue, which was finally resolved on the merits, certainly may not now be reconsidered in this collateral proceeding on fees. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980).

1. See the one-page, unreported decision by the First Circuit in Smith v. Cumberland School Committee, Nos. 81-1454 and 81-1499 (1st Cir. Jan. 11, 1982), a decision which was filed in the district court on January 12, 1982, and which is a part of the record in this case.

5. Despite respondents' bald assertion in their Brief for Respondents at 15-16 that petitioners prevailed on the merits only in an action to enforce the EAHCA (which was not even effective when this action was commenced), there simply is no question on this record that petitioners prevailed in an action in which they asserted substantial constitutional claims through § 1983 and that they accordingly prevailed in "any action or proceeding to enforce a provision of" § 1983. 42 U.S.C. § 1988. Similarly, since petitioners prevailed in an action in which they asserted a substantial claim of exclusion from education in violation of § 504 of the Rehabilitation Act, they accordingly prevailed in "any action or proceeding to enforce or charge a violation of" § 504 within the meaning of § 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b). Congress' intent, much

less its express language, cannot be so blithely ignored. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("we are obliged to give effect, if possible, to every word Congress used").

6. Respondents' final set of contentions in their Brief for Respondents at 16-17, pertaining to the alleged unavailability of fees under § 505(b) of the Rehabilitation Act, is also wide of the mark. First, petitioners' § 504 claim was an exclusion claim, not at all a claim having anything to do with requesting substantial modifications in existing programs. See Brief for Petitioners at 27-29, 58-74. Second, there is no longer any legal question about the existence of an express statutory private right of action to enforce § 504. See Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984); see also Brief for Petitioners at 71-72 n.31. Finally, there is no eleventh

amendment immunity from an award of fees under § 505(b) not only because Congress incorporated into § 505(b) the legislative history of the 1976 Fees Act, see Brief for Petitioners at 61-62 & n.26, but also because Congress explicitly enacted § 505(b) pursuant to its power under § 5 of the fourteenth amendment and expressly dictated that "the 11th amendment is no bar to the recovery of attorney's fees under the proposed section 505(b)," 124 Cong. Rec. 30347 (1978) (remarks of the fee provision's author, Senator Cranston); id. at 37508 (remarks of Senator Stafford, the ranking member of the Subcommittee on the Handicapped). See generally Hutto v. Finney, 437 U.S. 678 (1978).

Respondents' arguments are entirely without merit.

II. Petitioners Prevailed Throughout the Merits Proceeding on Their Due Process Claim, and They Ultimately Prevailed on the Merits Primarily as a Result of Certified State Law Questions Answered by the Rhode Island Supreme Court

Respondents assert throughout their Brief for Respondents that petitioners' constitutional claims were, in respondents' view, essentially meaningless; and they appear to argue that petitioners' rights were in any event guaranteed by state law throughout this litigation. These distortions are belied by the record in this case.

1. In support of their view that petitioners "resort[ed] to a pleading trick" by alleging what respondents refer to as "a sham constitutional claim," Brief for Respondents at 5-6, respondents quote at length from the Rhode Island statute which respondents now concede guaranteed an education to petitioner Tommy Smith and all other emotionally handicapped children at "all relevant times" in

this litigation, id. at 11. Respondents, however, fail to point out that respondents refused to enforce this statute, that they instead fully supported the local school committee's refusal to comply with this statute, and that their actions would have in fact totally excluded petitioner Tommy Smith from receiving an education had petitioners not commenced this litigation. See Brief for Petitioners at 4-18. What respondents also fail to point out is that petitioners succeeded on their due process claim not only in preventing the total denial of an education to Tommy without any prior notice or hearing whatsoever, but also in securing an education for Tommy throughout the lengthy litigation proceedings on the merits of this case. Id.; see also supra at 3-4. Far from being a sham, petitioners' constitutional claims provided them with success throughout the pendency of this litigation and provided

the foundation for their ultimate success.

2. Ultimately, petitioners did prevail primarily as a matter of state law subsequent to the Rhode Island Supreme Court's decision, J.A. 129-51, on two state law questions certified to it by the federal district court, J.A. 108-26. Contrary to the implications in their Brief for Respondents at 5-6, respondents prior to being sued in this lawsuit refused to enforce state law, see Brief for Petitioners at 4-18; see also supra at 9-10, a fact which brought about this litigation, id. Additionally, both the federal court's certification order, J.A. 108-26, and the Rhode Island Supreme Court's decision on certification, J.A. 129-51, recognized the crucial role provided by petitioners' constitutional and federal statutory claims.

Because of the fact that petitioners nonetheless ultimately prevailed under state

law, there is possibly a superficial resemblance between the resolution of this case on the merits and this Court's decision in Pennhurst v. State School & Hospital v. Halderman, 104 S.Ct. 900 (1984) ("Pennhurst II"). In Pennhurst II, a case in which plaintiffs had alleged a pendent state claim in federal court, this Court held that the federal court was barred by the eleventh amendment from interpreting state law and ordering defendant state officials to comply with state law. On the facts relevant to the merits proceeding here, Pennhurst II is inapposite.2/

2. Even if the merits proceeding in this case had been factually and chronologically similar to that in Pennhurst II (i.e., a pleading with a pendent state law claim, a resolution of the state law issue by the federal court, and a federal court order on the merits requiring state compliance), even then the merits proceeding could not now be reconsidered in this collateral proceeding on fees. White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980).

[footnote con't on next page]

Petitioners on the merits have never

In any event, even if the long-ago-resolved merits could be reopened and reconsidered in this collateral proceeding, Pennhurst II still would have no effect here since it could not be applied retroactively under the three considerations set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), and applied definitively to this Court's decision on Art. III jurisdiction in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982). As in Northern Pipeline, id. the relevant "considerations militate against the retroactive application" of Pennhurst II.

Initially, the Court in Pennhurst II decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. This conclusion is compelled by a comparison of Justice Powell's majority opinion, 52 U.S.L.W. at 4155-65, with Justice Stevens' dissenting opinion, 52 U.S.L.W. at 4165-76. See also, e.g., such pendent claim cases as Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); and such pendent claim and eleventh amendment cases as Greene v. Louisville & Interurban R. Co., 244 U.S. 499 (1917); and Rolston v. Missouri Fund Commissioners, 120 U.S. 390 (1887).

Additionally, retroactive application of Pennhurst II would not further the operation of its holding but would instead, as is well illustrated by this case, produce substantial inequitable results in individual cases since retroactive application would play havoc with such established legal doctrines as res judicata, law of the case, and finality; it would require relitigation of hundreds of lawsuits which had been finally resolved on the merits; and it would require an

alleged a pendent state claim in their initial Complaint, J.A. 8-14; in their First Amended Complaint, J.A. 49-64; or in their concluding Second Amended and Supplemental Complaint, J.A. 152-168. No pendent state law claim, in other words, was ever involved here.

Nevertheless, because respondents' erroneous interpretation of and refusal to enforce state law had caused the federal constitutional and federal statutory violations complained about by petitioners, id., see also Brief for Petitioners at 7-8, and because the federal district court believed that respondents may have been wrong as a matter of state law, J.A. 108-23, the

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unprecedented waste of scarce judicial resources. Similar and even lesser inequities bar retroactivity. See, e.g., Northern Pipeline; Chevron Oil; Cipriano v. Houma, 395 U.S. 701 (1969); Allen v. State Board of Elections, 393 U.S. 544 (1969); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

federal court "in the interest of comity and in order to avoid unnecessary adjudication of constitutional and federal claims" certified two state law questions to the Rhode Island Supreme Court for decision, J.A. 124-26;[3] cf. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). The Rhode Island Supreme Court, in response to certification, answered both questions in favor of petitioners. J.A. 129-51.

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3. Rule 6 of the Rules of the Supreme Court of Rhode Island provides in relevant part:

> This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, or a United States District Court when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in decisions of this court.

The federal district court at this point did not excercise any federal judicial power based on its prior constitutional decision, on its view of the federal statutory claims, or even on state law. Instead the federal district court, after receiving the decision rendered by the Rhode Island Supreme Court and after ascertaining the local school committee's agreement to comply with that decision, J.A. 172-76, simply found as an ultimate finding of fact that petitioners had prevailed by obtaining the objective sought in their lawsuit. J.A. 189-94. Without ever interpreting state law and without ever issuing injunctive relief requiring respondents' compliance with state law, the district court concluded its final order on the merits by stating:

> It having been established that [petitioner] Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, [petitioners] have

> obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims.
>
> The entry of this order resolves all issues in this case with the exception of the question of attorney's fees. [Petitioners] are hereby given fourteen days to move for an award of fees.

J.A. 193.[4]

This case, in sum, involved no federal court order requiring state officials to comply with state law, no federal court interpretation of state law, and in fact no pendent state law claims. Instead, on the uncontested and uncontrovertable facts in this case, petitioners alleged substantial federal constitutional and federal statutory

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4. The First Circuit, in affirming the district court's final resolution on the merits and in rejecting respondents' appeal from the merits, similarly concluded that petitioners had "won, as a matter of state law, all that [they] originally sought," and that the litigation on the merits was accordingly "moot." J.A. 6; see also supra at 5 and note 1.

claims; petitioners prevailed initially and throughout this litigation on the merits on their due process claim; and petitioners thereafter prevailed primarily as a result of the Rhode Island Supreme Court's certified interpretation of a state law which respondents had refused to enforce.

CONCLUSION

For the reasons stated herein and in our opening Brief for Petitioners, petitioners should be held entitled to fees and the judgment of the First Circuit accordingly should be reversed.

Dated: March 21, 1984

Respectfully submitted,

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